El Paso Electric Company *and* International Brotherhood of Electrical Workers, Local Union 960.[1] Cases 28–CA–19551 and 28–CA–20017

June 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The principal issues in this case are whether the Respondent (1) violated Section 8(a)(1) of the Act by impliedly threatening to discharge union supporters by suggesting that they should seek other work if they were unhappy; (2) violated Section 8(a)(3) by issuing an unsatisfactory performance evaluation to and later discharging Cecilia Rodriguez, and by disciplining Sira Fanely; and (3) violated Section 8(a)(5) and (3) by unilaterally changing employees' lunch schedules and altering cashier shortage and overage limitations.[2] Unlike the judge, we find that the General Counsel has failed to show that the Respondent unlawfully threatened union supporters or that the evaluation and discharge of Rodriguez were unlawful. We agree, however, with the judge that the discipline of Fanely violated Section 8(a)(3). We also agree that the unilateral changes described above violated Section 8(a)(5), and we find it unnecessary to decide whether the changes in employees' lunch schedules also violated Section 8(a)(3).[3]

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] On April 4, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[3] The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we affirm the judge's dismissal of allegations that the Respondent unilaterally implemented rules regarding monitoring of employee interactions and tardiness in violation of Sec. 8(a)(5).

I. BACKGROUND

The Respondent generates and distributes electricity in Texas and New Mexico. It employs about 66 customer service representatives (CSRs), who serve as cashiers and assist customers with questions, payments, and transfers.

During the spring of 2004, the Union, which has represented the Respondent's operational employees since 1944, began an organizing drive among the CSRs. Since winning a Board election on August 20, 2004, the Union has represented CSRs at the Respondent's El Paso call center and outlying offices, including an office in Chelmont, Texas.

The alleged unfair labor practices in this case relate to events at the Chelmont office between June 7 and September 29, 2004. During that period, Gary Hedrick was the Respondent's chief executive officer and president. Judith Kummrow was the Respondent's manager for customer services for its outlying offices. Rose Lowe was the CSR supervisor of the Texas outlying offices, but spent 3 days a week at Chelmont. Yvonne Garcia, the most senior CSR at Chelmont, was named the team leader there in March 2004.

Rosalba Vargas, Tanya Walker, Angelina Ornelas, and Cecelia Rodriguez were CSRs at the Chelmont office. Walker, Ornelas, and Rodriguez were probationary employees until June 2004. After their probationary period and review, Walker and Ornelas were retained as full-time employees. Rodriguez was not.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Violation of Section 8(a)(1)

After setting forth the relevant testimony of several witnesses to this alleged violation, the judge stated that she was "unable to determine which account" to credit. Despite her inability to determine precisely what was said, the judge nonetheless found that a statement made by the Respondent's president, Hendrick, at a meeting with the CSRs violated Section 8(a)(1). We dismiss the allegation, for the reasons that follow.

1. Facts

On June 7, during the union organizing campaign, President Hedrick spoke to 9 to 10 CSRs at the Respondent's Chelmont office. Hedrick began the meeting with a discussion of his view of the historical role of unions. Although he praised the "proud and proper place" of unions, he argued that most of the problems that originally prompted the creation of unions had been solved. Hedrick stated that the electric industry faced "a different environment today than in 1930," and that unions required "burdensome contracts" and were "slow, cumbersome, and inflexible." He stressed that El Paso Electric

was prepared to pay and treat employees fairly. He told them "they're not going to get any more fair treatment being represented by a union."

Hedrick then opened the floor to questions. According to witness accounts, the rest of the meeting consisted largely of discussions between Hedrick and employees Cecilia Rodriguez, Lisa Fanely, and Rosalba Vargas. Fanely spoke first, complaining about job descriptions and announcing that she intended to vote for the Union.

Rodriquez spoke after Fanely. Rodriguez testified that she began by telling Hedrick that her only exposure to unions was at her last job (a bank) and that she wanted to know the pros or cons of unions. She then asked him whether the Union could help her with a sick leave problem she encountered a year earlier while working for the Respondent.

The witnesses do not agree as to Hedrick's response. Several testified, in effect, that Hedrick insinuated that if Rodriguez was unhappy enough to want union representation, she should look for work elsewhere. Thus, Rodriguez testified that after she raised the sick leave issue, Hedrick replied, "if I was so unhappy, I should go back to where I came from." Fanely testified that after Rodriguez said that things were handled more professionally at the bank, Hedrick said, "why don't you go back where you came from?" Walker testified that Hedrick said, "if we weren't happy there, we could find another job."

Other witnesses, however, testified that Hedrick simply wondered why Rodriguez left the bank if conditions were favorable there. For example, employee Vargas testified that after Rodriguez mentioned "things [like sick leave] . . . were handled in a more professional way [at the bank]," Hedrick responded, "Well, if it was so good there, why did you leave? Why don't you just stay there?" Employee Ornelas testified that Hedrick asked Rodriguez if she thought her union bank job "was so good . . . if you liked it so much, why did you leave? Why are you here?" Employee Munoz testified that after Rodriguez talked about working at a more professionally run bank, Hedrick said, "if it was so good, why did you leave?" Hedrick denied that he asked employees, "Well, if you liked it so much there, why don't you go back there?"

The judge did not resolve this testimonial discrepancy by making a credibility determination; indeed, she stated that she was unable to do so. She found, however, that Hedrick unlawfully implied that employees who were unhappy, or who wanted a union, should seek other employment.

2. Discussion

To determine whether a statement constitutes a threat under Section 8(a)(1), the Board considers whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). The Board has consistently found violative employer statements that a union supporter who is unhappy should seek work elsewhere. Such statements suggest that union support or dissatisfaction is incompatible with continued employment. See, e.g., *Paper Mart*, 319 NLRB 9 (1995) (finding unlawful an employer's statement that if employee was not happy, the employee could seek employment elsewhere); see also *Tualatin Electric*, 312 NLRB 129, 134 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996); *Rolligon Corp.*, 254 NLRB 22 (1981); *Stoody Co.*, 312 NLRB 1175, 1181 (1993).

In finding Hedrick's remarks unlawful, the judge apparently reasoned that, regardless of which witness' version of those remarks was the most accurate, the effect of all of the versions was that employees should return to a former job or find another job if they were unhappy. We disagree, because some versions of Hedrick's statement cannot reasonably be so construed. According to Vargas, Ornelas, and Munoz, Hedrick simply asked Rodriguez why she left her unionized job at the bank if things were so much better there. That is not a suggestion that Rodriguez, or any other employee, leave the Respondent's employ. It is merely a way of underscoring Hedrick's central point, that union representation would not materially benefit the CSRs, by implying that if conditions were superior under union representation, Rodriguez would not have left her job at the bank.

Thus, we are faced with competing versions of what Hedrick said at the June 7 meeting; some are lawful, and others are not. The judge professed her inability to make a credibility finding, and we find no record evidence, inherent probabilities, or reasonable inferences to be drawn from the record as a whole that would enable us to resolve the conflict in the witnesses' testimony.[4] Accordingly, because we find the evidence to be in equipoise, the General Counsel has failed to carry his burden to prove that Hendrick's statement violated Section 8(a)(1). See *RC Aluminum Industries*, 343 NLRB 939, fn. 2 (2004). We thus shall dismiss this allegation.

B. The Alleged Independent 8(a)(3) Violations

The judge found that the Respondent violated Section 8(a)(3) by terminating union activist Rodriguez and disciplining another union supporter, Sira Fanely. For the reasons discussed below, we agree with the judge that the discipline of Fanely was unlawful. However, we find

[4] Given the judge's stated inability to make a credibility determination, remanding this issue would be futile.

that the General Counsel has failed to show that antiunion animus was a motivating factor in Rodriguez' discharge, and we shall dismiss the allegation that her discharge was unlawful.

1. Facts

In early July, CSR Supervisor Lowe evaluated Rodriguez' performance and found it deficient in all but 1 of 12 job performance areas. Lowe gave Rodriguez these unfavorable ratings based on Rodriguez' failure to complete a 4- to 6-week training course at the Fabens office, time and attendance problems, poor job performance, and workplace attitude, which was found not to be conducive to teamwork.

On July 7, Lowe told Rodriguez that she had not passed her probation and would not be kept as a full-time employee. When Rodriguez asked why, Lowe went through each item of her end-of-probation review. She also told Rodriguez she was not a team player, did not get along well with others, and made working at Chelmont difficult.

On September 29, Lowe issued Fanely a written disciplinary notice, which read in pertinent part, "You have made statements and exhibited other behavior in the office that displays dislike or anger towards others. You also openly resist coaching and instruction from the office leadership. This behavior is offensive, creates an uncomfortable work environment, and is in violation of Company policy." Lowe also told Fanely she was rude, disruptive, defensive, negative, and verbally abusive. Lowe said she had no problem with Fanely's work, but only with her attitude.

2. Discussion

Analysis of whether an employer's action against employees violates Section 8(a)(3) of the Act is governed by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. 127 F.3d 34 (5th Cir. 1997).

The judge found that the General Counsel satisfied his initial *Wright Line* burden by establishing that the protected activities of Rodriguez and Fanely were motivating factors in Rodriguez' evaluation and discharge, and Fanley's disciplinary warning. She found that the General Counsel proved that Rodriguez and Fanely openly supported the Union; that the Respondent was aware of their prounion sentiments; and that the Respondent harbored animus toward their union activities. The judge based her animus finding on Hedrick's comment at the June 7 meeting, which the judge found to imply that unhappy CSRs should seek employment elsewhere, and also on what she found to be pretextual reasons advanced by the Respondent for its actions against the two employees.

The judge also found that, because many of its explanations were pretextual, the Respondent failed to demonstrate that it would have taken the same actions against Rodriguez and Fanely notwithstanding their union activity.[5] She therefore concluded that the unfavorable evaluation and discharge of Rodriquez and the disciplinary warning of Fanely violated Section 8(a)(3).

The validity of the judge's conclusions depends on whether the record supports her findings of animus. Those findings cannot rest on Hedrick's statement to the CSRs on June 7, because—as discussed above—we are unable to find that that statement was coercive. However, we find that the evidence of pretext, together with other testimony, supports the judge's finding that the Respondent had an unlawful motive in disciplining Fanely. By contrast, we find insufficient evidence of pretext to support a finding that the Respondent's actions against Rodriguez were unlawfully motivated.

a. Fanely

We agree with the judge, for the reasons discussed in her decision, that most of the Respondent's proffered reasons for disciplining Fanely were pretextual, and thus indicative of unlawful motive.[6] In addition, Manny Her-

[5] See, e.g., *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982) (a finding that an employer's explanations are pretextual means that they either did not exist or were not, in fact, relied on).

[6] Unlike the judge, however, we do not find that two of those reasons were pretextual. Lowe testified that Fanely expressed anger at Garcia's presence at Fanely's annual performance review. Although the judge discounted Lowe's testimony, it was corroborated at least in part by Garcia's testimony and by Lowe's contemporaneous notes of the meeting. The Respondent's failure to investigate and allow Fanely to explain her conduct at a meeting on September 21 is understandable, because Lowe also attended that meeting and witnessed Fanely's behavior. Accordingly, we do not rely on these reasons in finding that the General Counsel has demonstrated that Fanely's discipline was unlawfully motivated.

nandez, one of the Respondent's labor relations representatives, told Union Business Manager Felipe Salazar that the Respondent had made changes in the CSRs' lunch schedules to "straighten out" Fanely. That statement, together with the pretextual nature of many of the Respondent's explanations for her disciplinary warning, suffices to establish that Fanely's union activities were a motivating factor in her discipline. And because most of its professed reasons were pretextual, the Respondent has not shown that it would have disciplined Fanely even absent her union activities.[7] Accordingly, we affirm the judge's finding that the discipline violated Section 8(a)(3).

b. Rodriguez

We reach a different conclusion with regard to Rodriguez. First, there is no evidence of any statement analogous to that made by Hernandez indicating that the Respondent was retaliating against Rodriguez for her union activities. Second, we disagree with the judge's finding that the Respondent's reasons for giving Rodriguez an unsatisfactory evaluation and later discharging her were pretextual. We find instead that out of the numerous reasons given for Rodriguez' termination at most only one was arguably pretextual.

The judge faulted the Respondent's citation of Rodriguez' time and attendance problems as a basis for its actions. But the record indicates that Rodriquez did indeed have time and attendance problems. The judge conceded that Rodriguez "miss[ed] more time than the other two probationary CSRs." Garcia gave uncontradicted testimony that Rodriguez was tardy "at least twice a week." And, contrary to the judge's finding that "Lowe never told Ms. Rodriguez that her time was a problem" before her discharge, Lowe testified that she told Rodriguez during her 3-month evaluation that she "had to work [on] her attendance adherence [and] schedule adherence." Further, Rodriguez admitted that she was chastised for arriving a half-hour late on Tuesday when all of the CSRs were told to arrive early after a 3-day weekend. Thus, Rodriguez was, in fact, informed prior to her discharge that her tardiness and attendance were problems.

The judge found the Respondent's reliance on Rodriguez' error rate to be pretextual because Rodriguez was "never informed her error rate was unacceptable." In fact, Rodriguez admitted that Garcia brought her mistakes to her attention "every now and then." Garcia corroborated this testimony, testifying that Rodriguez was "advised of [her] errors that are done." Both Lowe and Garcia testified that Rodriguez was warned about her errors in her 3-month review.

The judge also found the Respondent's citation of Rodriguez' poor attitude to be pretextual. This finding was based in part on what the judge apparently found to be a contradiction between the lack of any mention of attitude problems in Rodriguez' 3-month review and Lowe's subsequent statement that her "conduct at work the last six months has not been conducive to positive, professional working relationships."

We do not see a contradiction. The review covered only the first 3 months of Rodriguez' employment, while Lowe's testimony was directed at a 6-month period. Further, Lowe's testimony that *at times* during the 6-month review period, Rodriguez' attitude was a problem, is consistent with his further testimony that Rodriquez "developed a negative attitude" in the 3 or 4 months before her discharge. Accordingly, we disagree with the judge's finding that the Respondent's reliance on Rodriguez' poor attitude is evidence of pretext.

Finally, the judge faulted the Respondent's reliance on Rodriguez' failure to complete her training at the Fabens office because of transportation problems. The judge found that, even after those problems had been resolved, the Respondent failed to schedule Rodriguez for training; thus, she found that the Respondent itself was responsible for Rodriguez' incomplete training. Arguably, this suggests pretext. However, the Respondent relied on numerous other reasons for its actions, none of which we find to be pretextual. Indeed, the judge implicitly found most of those reasons to be valid. Given the abundance of valid reasons, we are unwilling to infer, from this one arguably pretextual explanation, that the Respondent was motivated by antiunion animus. Accordingly, we find that the General Counsel has not shown that Rodriguez' union activities were a motivating factor in her evaluation and discharge, and we shall dismiss this allegation.[8]

C. Unilateral Changes in Lunch Schedules

The judge found, and we agree, that the Respondent violated Section 8(a)(5) by making unilateral changes to the CSRs' lunch schedule on August 23, 2004.[9] The General Counsel cross-excepts to the judge's failure to find that those changes also violated Section 8(a)(3).

We find it unnecessary to pass on this exception because finding the alleged 8(a)(3) violation would not materially affect the remedy. To remedy the Respon-

[7] *Limestone Apparel Corp.*, supra.

[8] We therefore find it unnecessary to pass on the judge's discussion of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[9] We also adopt the judge's findings that the Respondent violated Sec. 8(a)(5) by unilaterally instituting a limitation on employee cashier shortages or overages.

dent's 8(a)(5) violation, the judge ordered the Respondent to cease and desist from making unilateral changes and to rescind the unilateral lunch schedule changes. These provisions would also be an adequate affirmative remedy for a 8(a)(3) violation. Our Order also includes a provision directing the Respondent to cease and desist from violating Section 8(a)(3) by discriminating against any employee for engaging in union activities, in order to remedy the Respondent's unlawful discipline of employee Fanely. This provision, in combination with the provision requiring the Respondent to cease and desist from "like or related" misconduct, would serve to preclude the Respondent from engaging in future misconduct such as unilaterally changing employees' terms and conditions of employment for discriminatory reasons. Accordingly, our Order provides an adequate affirmative and cease-and-desist remedy for the alleged 8(a)(3) violation.

ORDER

The National Labor Relations Board orders that the Respondent, El Paso Electric Company, El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing terms and conditions of employment for employees in the following unit: All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

(b) Issuing written disciplinary warnings to or otherwise discriminating against any employee for engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the lunch hour schedule and cashier shortage and overage limitations unilaterally instituted on August 23, 2004, and notify the Union and the unit employees in writing that it has done so.

(b) Make whole employees in the unit, with interest, for any loss of earnings and other benefits that they may have suffered due to the Respondent's altered CSR lunch hour schedules and cashier shortage and overage limitations instituted on August 23, 2004.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warning to Sira Fanely, and within 3 days thereafter notify her in writing that this has been done and that the warning will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its El Paso telephone center and its outlying offices in Texas and New Mexico, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 23, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. June 29, 2007

Robert J. Battista, Chairman

Wilma B. Liebman, Member

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change terms and conditions of employment of employees in the following unit: All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

WE WILL NOT issue disciplinary warnings to or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local Union 960, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the lunch schedule and cashier shortage and overage limitations we unilaterally changed on August 23, 2004; WE WILL reimburse any employee for any loss they suffered due to these changes; and WE WILL notify the Union and the unit employees in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warning to Sira Fanely, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

EL PASO ELECTRIC COMPANY

Mara Anzalone, Esq., for the General Counsel.

Dan C. Dargene and *Jarrett R. Andrews, Esqs. (Winstead, Sechrest & Minick),* of Dallas, Texas, for the Respondent.

Felipe Salazar, Business Manager, of El Paso, Texas, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in El Paso, Texas, on February 15 and 16, 2005,[1] upon order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued November 19, 2004, by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by International Brotherhood of Electrical Workers, Local Union 960, AFL–CIO (the Union or the Charging Party).[2] The complaint, as amended, alleges El Paso Electric Company (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did Respondent independently violate Section 8(a)(1) of the Act by threatening to discharge or to make unspecified reprisals against employees if they engaged in protected activities?

2. Did Respondent violate Section 8(a)(3) of the Act by issuing an unsatisfactory performance evaluation to and discharging Cecelia Rodriguez on July 7, and by issuing a written warning to Sira Fanely (Fanely) on September 29?

3. Did Respondent violate Section 8(a)(5) of the Act by promulgating and implementing changes concerning the following terms and condition of employment without prior notice to the Union and without affording the Union an opportunity to bargain regarding the changes: attendance rules, lunchbreak schedules, cashier shortage and overage rules, and monitoring of employees.

III. JURISDICTION

Respondent, a Texas corporation, with an office and place of business in El Paso, Texas has, at all relevant times, been a public utility engaged in the generation, transmission, and distribution of electricity in the states of Texas and New Mexico. During the 12-month period ending July 14, Respondent annually purchased and received goods valued in excess of $50,000 directly from points outside the State of Texas. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.[3]

[1] All dates herein are 2004, unless otherwise specified.

[2] At the hearing, counsel for the General Counsel amended the complaint to allege Yvonne Garcia, office team leader, as supervisor and agent of Respondent within the meaning of Sec. 2(11) and (13) of the Act, which allegation Respondent denied.

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

IV. FINDINGS OF FACT

A. Supervisory/Agency Status of Yvonne Garcia

Respondent employs about 66 customer service representatives (CSRs) in several locations. About 44 work in the downtown El Paso call center, and the remainder work in outlying offices, including the Chelmont, Fabens, and Van Horn, Texas offices. At all times material hereto, Rose Lowe (Lowe) has been the CSR supervisor of the Texas outlying offices and since March 2004, Yvonne Garcia (Garcia) has been the Chelmont office CSR team leader. As such, she oversaw the work of the Chelmont CSRs. She had the authority to enforce work rules and brought employee work issues to the attention of Lowe, who decided what disciplinary action should be applied. Garcia made work assignments and could take a CSR off one job and assign her to another. She was in charge of the Chelmont office during the absences of Lowe, usually 2 days a week. She could correct employees when they make mistakes or point out infractions of work rules. She could not hire, transfer, suspend, lay off, recall, promote, discharge, or discipline other employees or grant or deny overtime to employees without supervisory approval. Respondent did not permit Garcia to attend the June 7 meeting because it did not want supervisory team leader-type people present, as the CSRs might feel inhibited in bringing up issues.

During the 2004 union campaign, Garcia handed out campaign literature for Respondent that explained what the company could do in the absence of a union. She also distributed "Payday" candy bars with a missing portion to represent how union dues decreased a paycheck.

B. Hiring and Training of CSRs in 2004

Prior to January 2004, in the Chelmont office, Respondent utilized the services of several workers referred by a temporary labor agency as cashiers. In 2004, Respondent did away with all temporary positions, combined cashier and CSR duties, and hired five full-time CSRs. Cecelia Rodriguez (Rodriguez), who had previously held a temporary cashier position with Respondent was among the five new hires whom Respondent employed on January 12, and was assigned to the Chelmont office as were new hires Tanya Walker (Walker) and Angelina Ornelas (Ornelas), both of whom were still employed by Respondent at the time of the hearing. All new CSRs had to complete a 6-month probationary period before being permanently hired.

Respondent planned for Rodriguez, Walker, and Ornelas, seriatim, to attend 4 to 6 weeks of training at the Fabens office, a site 63 miles from Rodriguez' home, where each could receive one-on-one training. Rodriguez attended training for 9 days, after which she experienced transportation problems. Respondent agreed that she could be the last CSR to attend training.[4] Thereafter, Respondent sent Ornelas and then Walker for training. In mid-April, Rodriguez' informed supervision that her transportation dilemma had resolved, and she was ready to go to training.[5] Lowe told Rodriguez that Respondent would wait and see how the vacation schedule went before sending her to training. Lowe provided Rodriguez with training materials, and other CSRs helped Rodriguez under Lowe's observation. Although Lowe did what she could to help her learn the job, Rodriguez reported to Lowe that she needed more training. Respondent never rescheduled Rodriguez for training at Fabens.

C. The Union Campaign

During the spring of 2004, the Union commenced an organizing campaign among Respondent's CSRs. During the course of the campaign, Respondent conducted meetings among employees at various locations where CSRs worked. On June 7, Gary Hedrick (Hedrick), chief executive officer and president of Respondent, spoke to 9 to 10 CSRs at Respondent's Chelmont office with the purpose of convincing them it was not in their best interests to vote for the Union in the upcoming election. Speaking for about 15–20 minutes, Hedrick told the CSRs he was not antiunion, that he believed unions were created to redress significant problems in America and that they held a proud and proper place in its history. He said he thought most of the problems unions were created to address no longer existed and were, in fact, against the law. He told the CSRs he thought unionization was cumbersome and restrictive, and in the present competitive environment of the electric utility industry, it was the wrong time to be thinking about making Respondent's business processes slower, more cumbersome, and inflexible. Such would only interfere with Respondent's ability to compete in a dynamic and changing industry where a company needed to make quick decisions and move one direction or the other quickly, which could not be done in a union environment. Hedrick told the group Respondent was prepared to pay and treat them fairly and in his view they would not get any fairer treatment through unionization. After these remarks, Hedrick opened the meeting to questions.

There is no dispute that only CSRs Rodriguez, Sira Fanely (Fanely), and Rosalba Vargas (Vargas) spoke up during the question and answer period of the meeting with Rodriguez and Fanely being the most vocal. While witnesses to the meeting gave somewhat varying versions of Hedrick's responses to questions, credible consensus establishes the following:

Of all the campaign meetings Hedrick held with CSRs, the employee exchange in the Chelmont meeting was the most intense. To use Hedrick's words, Rodriguez asked "lots of

[4] Rodriguez testified that Respondent interrupted the Fabens training for all employees in January and did not restart it until March. The record does not support her testimony in this regard.

[5] Garcia testified that when Walker was about to return from training, and it was Rodriguez' turn to go, Rodriguez told Garcia and Lowe that she was still unable to attend training because of transportation problems. Lowe did not corroborate that testimony but testified that Rodriguez never indicated to her a willingness to return to training. Lowe also testified, as set forth below, that Rodriguez said she needed more training. After that complaint, Lowe neither scheduled Rodriguez to complete training nor pointed out that Rodriguez' transportation situation had made training impossible. The absence of so logical a response suggests that Respondent was aware that transportation concerns no longer prevented Rodriguez from completing training. Given the inconsistent testimony and the inherent incongruity of their accounts, I do not credit either Garcia or Lowe on this point. Rather, I accept Rodriguez' testimony that she informed her supervisor she was able to attend training.

questions very quickly," and her interchange with him was "spirited" and "fast and furious." Relating a past experience where a supervisor had forced her to stay at work although she was so ill she later required hospitalization, Rodriguez, in Hedrick's opinion, "kind of dominat[ed] the meeting" with a repetitious discussion that frustrated Hedrick. When Rodriguez admitted not using internal company processes to complain, Hedrick said it was impossible for Respondent to deal with problems of which they were not made aware. Rodriguez and Fanely, supported by Vargas also brought up time off and equal treatment issues.[6]

Fanely said job descriptions should be updated because some CSRs were not being appropriately compensated. Hedrick encouraged employees to use company processes to address work issues. One of the three vocal CSRs said, "Well, but if you talk and it doesn't get fixed, then an employee might . . . turn to the union as a last resort." One of the three CSRs pointed out that the union had a grievance process. Fanely said she would vote for the union so that issues and grievances could be investigated outside the company.

Witnesses to the meeting dispute whether and/or how Hedrick responded to Rodriguez' expressed opinion that conditions in her former unionized job had been better than those at Respondent. Vargas and Nora Munoz (Munoz), the latter of whom testified as a witness for Respondent, remembered Hedrick asking Rodriguez why, if work had been so good with her former employer, she had left. Rodriguez, Fanely, and Ornelas recalled that Hedrick asked why Rodriguez did not return to that job. Walker and Ornelas testified, essentially, that Hedricks told the CSRs that if they were not happy there, they could look for other jobs where there was a better work environment. Munoz recalled that Hedrick said a lot of people would like to work for Respondent, which she interpreted as notice that if employees did not like the conditions at Respondent, there were others to replace them. Hedrick denied telling any employee that she should return to her former employer.

I find that each employee witness attempted sincerely and candidly to recount all that she remembered of what was said at the meeting. The inability of these witnesses to recount the entire employee/management exchange at the June 7 meeting and the absence of completely corroborative testimony on every point is no basis for disbelieving individual recollections, and I do not discount any employee testimony. Given the differing versions of the meeting, I am unable to determine which account most closely reflects Hedrick's statements. However, after considering all of the testimony and allowing for the reality that honest witnesses may recall parts but not the whole of what is said in a meeting, I conclude that Hedrick did convey to employees the message that if CSRs were unhappy with Respondent, they should seek other employment.

Witnesses to the meeting also disagree whether and/or how Hedrick told Rodriguez, Fanely, and Vargas that he believed they would vote for the Union to spite him. Rodriguez testified that at the conclusion of the meeting, Hedrick said to Rodriguez, Fanely, and Vargas, "Well, I know you three will vote for the Union just to get back at me." Fanely recalled that just before he ended the meeting, Hedrick turned his chair toward Rodriguez, Fanely, and Vargas and asked, "Are you guys going to vote union just to get back at me?" Walker testified that Hedrick said to Fanely and Vargas, "Because you're not happy, so instead of coming to me, you are going to go vote yes for the union." Neither Vargas nor Ornelas recalled any such comment, although Ornelas said Hedrick, laughing, asked Fanely, "Oh, is that why you are going to vote for the Union, just for having a day off?" While I am unable to determine specifically what Hedrick may have said about voting for the Union, I find he expressed an expectation that Rodriguez, Fanely, and Vargaws would vote for the Union in the upcoming election.

Both Lowe and Garcia were aware that Rodriguez and Fanely got upset with Hedrick in the meeting: following the meeting, Rodriguez told Garcia that she was displeased at how unprofessional Hedrick had been, and Lowe told Vargas she knew what had occurred in the meeting. About 6 weeks after the meeting, Respondent promoted Vargas to a CSR-2 position.

A representation election conducted by the Board on August 20 resulted in the certification and corrected certification on August 30 and November 19, respectively, of the Union in the following unit of Respondent's employees:

> All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center [employees] at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

D. The July 7 Unsatisfactory Performance Evaluation and Termination of Rodriguez

Sometime in March, Lowe and Garcia met with Rodriguez for her 3-month progress review. Lowe told Rodriguez she was doing "pretty good." She praised Rodriguez' performance in connecting customers and communicating effectively with them. She said nothing about any attitude problems but reminded her, as she did all employees, to watch her tardiness or "schedule adherence." Rodriguez said she did not feel she had sufficient training to be comfortable in the job. Lowe said the best way to learn was on the job.

Beginning at least in March, Rodriguez told coworkers she did not like the way the Chelmont office was running, that she thought supervision showed favoritism to CSR Hilda Bautista (Bautista), especially with regard to attendance. On May 28, Rodriguez sent the following e-mail to Lowe, protesting denial of leave:

> ROSE I KNOW I AM SUPPOSE[D] TO CHECK IN ADVANCE IF I CAN HAVE SOME TIME OFF. WELL I ASKED BACK IN APRIL IF I COULD HAVE THE 16TH OF AUGUST OFF FOR THE FIRST DAY OF SCHOOL. I WAS TOLD NO BECAUSE LUCY WAS OFF!
>
> HILDA ASKED FOR JUNE 1ST & 2ND TODAY . . . IT WAS APPROVED! BY THE WAY SHE CALLED IN

[6] Specifically, Rodriguez complained that favoritism existed and that in the past she had been refused time off while coworker, Hilda Bautista, was granted leave.

> SICK ON WEDNESDAY I WAS OUT AND THEN SHE LEFT TODAY FRIDAY EARLY.
>
> I AM VERY UPSET BECAUSE I AM ASKING ALMOST 3 MONTHS IN ADVANCE AND I GET A NO BECAUSE LUCY IS ON VACATION.
>
> SOMETHING IS WRONG HERE. MAYBE WE NEED TO TALK ABOUT THIS WHEN YOU GET BACK.

Lowe responded as follows:

> . . . I apologize for any confusion. I am always trying to do things to improve our operations, but it's trial and error. I do not see a problem with you taking the 16th of August off and I will let the others know that it is possible to let more than one person off per office.

At the June 7 meeting with Hedrick, Rodriguez expressed negative opinions of CSR working conditions, as described above. Garcia heard Rodriguez complain to other employees about conditions at Respondent compared to her previous employment.

In early July, Lowe filled out "Probationary Employee's 6-Month Rating Sheet" for Rodriguez, evaluating her in the following job performance areas as follows:

1. Job knowledge: Does employee know job requirements well?	NO
2. Quality of work: Is quality of work good?	NO
3. Quantity of work: Is quantity of work meeting standards?	NO
4. Safety: Does employee try to work safely and follow safety rules?	YES
5. Initiative: Is employee a "Self-Starter"?	NO
6. Dependability: Can you count on the employee to follow instructions and to do what you expect?	NO
7. Conduct: Does employee follow conduct rules?	NO
8. Punctuality: Is employee at work on time regularly?	NO
9. Cooperation: Does employee try to work as a team member?	NO
10. Does employee meet established standards regularly?	NO
11. Has this employee been fully trained in his/her job?	NO
12. Is employee making satisfactory progress in training?	NO

The attached explanation of the evaluation ratings, reads in pertinent part:

> Ceci did not complete the [required] four to six weeks training at the Fabens office location. Although her training [was scheduled to] commence in January at Fabens, Ceci gave personal transportation problems as the reason why she could not continue. . . . By mid-March or April there still was no resolution so we began her training at the Chelmont office. This has been a slower process because customer activity at Chelmont is the busiest of all EPE outlying offices and inhibits and lengthens the training process. Meanwhile, the rate of errors in Ceci's work and the level of assistance she needs to perform her duties affect EPE's level and quality of customer service. She has not met the level of skill and knowledge expected within six months.
>
> Shortly after employment, Ceci expressed her inability to report to work at 7:45 a.m. Her children had started school and she needed to drop them off at 8:00 a.m. Understanding that this was a temporary situation until she could make other arrangements, I changed her reporting time from 7:45 a.m. to 8:15 a.m. In spite of this accommodation, she reported late (after 8:15 a.m.) on numerous occasions, of which four were documented. On another occasion, I advised all CSRs to come in at 7:30 a.m. because the company had been closed three straight days due to a holiday and it would take extra time to process night depository payments on a timely basis. Ceci reported to work at 8:15 a.m. I was in my office with the Chelmont office leader. I asked Ceci if she had forgotten that I directed everyone to report early that day. Ceci responded, "Rose, I told you that I can't come in before 8:15 a.m." Then she walked off.[7]
>
> Ceci's conduct at work the last six months has not been conducive to positive, professional working relationships and a team environment.
>
> Ceci has displayed a noticeable negative attitude towards others in the way she talks to co-workers and sometimes, even customers. She has been loud, rude and has projected negative body language such as rolling her eyes and shrugging her shoulders. She has been particularly condescending towards her coworkers.
>
> . . . .
>
> All vacation schedules were turned in by February 1. Ceci was angry because one of the days she requested was unavailable. She sent me an inflammatory note on May 28, because she was still pressing for the unavailable day upcoming in August. I responded with a note to let her know circumstances had changed; I could probably permit her to take the day off and we should talk about it when I returned from the Fabens office a day or two later. In spite of my note, Ceci was quiet and moody with co-workers to the point of not even exchanging simple greetings. When I returned and we met, she stated . . ., "I am not the same person I was before." I replied, "Ceci, we all have bad days." She said, "No, this is the way I am now."

[7] No evidence was presented as to when this incident occurred, and there is no evidence that Rodriguez was disciplined as a result. Rodriguez testified without contradiction that on one occasion Lowe said she wanted all CSRs at work by 7:45 a.m. Rodriguez received permission from Garcia to come in at 8:15 a.m., but when she reported at that time, Lowe said in an abrupt manner, "Didn't I tell you to get here at 7:45?" When Rodriguez said she had cleared it with Garcia, Lowe said, "Well, the next time I tell you, you be here at 7:45." It is reasonable to infer that the two accounts reflect the same incident. I accept Rodriguez' version. No one corroborated any such insubordination as described by Lowe, and if Rodriguez had flouted Lowe's authority as represented, it is improbable that further action, or at least comment, would not have ensued.

> Ceci's conduct has not had a positive effect on team environment and spirit. She has looked for the negative in others and has even challenged why others ask questions related to job functions. She has shown a defensive attitude when being questioned about work processes and tasks.
>
> It is not recommended that this employee become a regular employee.

At the hearing, Lowe explained the basis of her 12-criteria assessment of Rodriguez, as follows:

> 1. Job Knowledge: Ms. Rodriguez still required a lot of help to "complete her training and to do the basics as far as customer service, and general information for customers." She was still making errors.
>
> 2. Quality of work: Ms. Rodriguez averaged two errors a day.
>
> 3. Quantity of work: Ms. Rodriguez' non-cashier customer walk-ins were "very minimal compared to the amount that the others were taking."
>
> 4. Safety: Ms. Rodriguez worked safely.
>
> 5. Initiative: Ms. Rodriguez required help with a lot of accounts. "She couldn't just start looking things up. We had to walk her through it."
>
> 6. Dependability: "On occasions we needed [extra help with] different things, and it wasn't there."
>
> 7. Conduct: "[T]his goes to our code of conduct, attitude, that falls in the respective of the attitude, and because she had several incidents, not witnessed just by me but by others, she did not meet the conduct."
>
> 8. Punctuality: Occasionally Ms. Rodriguez was late and missed work for various doctor appointments and other things.
>
> 9. Cooperation: Ms. Rodriguez "did her work, got her stuff done, and would go. She . . . seldom worked with the others."
>
> 10. Meet established standards: Ms. Lowe gave no specific explanation other than as set forth above.
>
> 11. Fully trained: Ms. Rodriguez did not complete her training.
>
> 12. Satisfactory progress: Ms. Lowe gave no specific explanation other than as set forth above.

With regard to attitude, Lowe testified that Rodriguez was angry and showed she disliked being at work, saying, "I really hate being here." When Lowe told her she was just having a bad day, Rodriguez replied on several occasions, "No, this is the way I am now." Lowe also testified that Rodriguez "answer[ed] Yvonne or . . . some of the CSRs [in a negative] tone of voice, the body language, the roll of the eyes, suggestions, and stuff like that. . . ." Garcia also thought Rodriguez had a negative attitude in that she "constantly complain[ed] about how things were done at El Paso Electric compared to her previous employment [in a bank]." Garcia noticed Rodriguez criticized Respondent to other CSRs in her presence and said she did not like to work for the company. Lowe never told Rodriguez her attitude was a problem prior to her discharge.

During 2004, all CSRs, even nonprobationary employees, made mistakes, but the probationary employees made more than the seasoned employees. Both Lowe and Garcia believed Rodriguez' errors predominated. Lowe did not, however, single out Rodriguez for counseling about mistakes but told all three new hires they needed to improve in customer training, saying they were making some errors. At the hearing, Respondent presented records of CSR mistakes showing the following:

> During the period June 24 through July 1, Ms. Rodriguez made ten mistakes.
>
> During the period June 1 through October 28, Ms. Walker made nine mistakes.
>
> During the period April 20 through December 14, Ms. Ornelas made 12 mistakes.

The above documentation of CSR mistakes is not clearly reliable. Respondent did not explain why it selected three different demonstrative periods; there is no evidence that mistake documentation was automatic or consistent rather than discretional, and Fanely and Ornelas observed that Garcia, who openly pointed out CSRs' mistakes, did so more frequently to Walker and Ornelas than to Rodriguez. Moreover, Ornelas testified that Garcia pointed out to her far more mistakes than the proffered records identified. I cannot, therefore, give significant weight to this documentation. Prior to her discharge, Respondent did not inform Rodriguez she was making an unacceptable number of mistakes.

With regard to employee attendance, Lowe looked for patterns, such as Monday, Friday, or before or after payday tardiness. She did not notice any such pattern with Rodriguez, but she explained why she focused on Rodriguez' absences: "[T]here was quite—a couple, and I noticed that the doctor appointments, and because she was on probation they have to be there. It's a little bit more—it's different when you're on probation than when you're a seasoned employee." Employee time-off records from January through June show that Rodriguez did miss more time than the other two probationary CSRs; the records also show that Bautista missed more time (by approximately 100 hours) than any other CSR. Prior to her discharge, Respondent did not inform Garcia she was missing too much work.

Lowe testified that she also terminated Rodriguez because she was "not a team player," which Lowe explained as an unwillingness to cooperate or to stay after hours and help out other workers. Lowe never spoke to Rodriguez specifically about not helping her coworkers but told all the employees they had to help each other. Lowe's testimony regarding Rodriguez' work ethic and attitude was contradicted by another of Respondent's witnesses, Munoz. Munoz, a Fabens' CSR who at various relevant times filled temporary details to the Chelmont office, testified that Rodriguez preferred cashiering to customer service, which she was having difficulty with. However, Munoz observed Rodriguez to be "peppy, outgoing, very hard working . . . [and that she] picked up a lot of the slack there."

After receiving input from Garcia, Lowe discussed her decision with Judy Kummrow (Kummrow) and with Dahlia De Los Santos (De Los Santos) of human resources. Kummrow agreed Respondent should terminate Gonzalez for the following reasons: failure to complete the CSR training, poor job performance, "unavailability to conduct business," and an "attitude in

the workplace that was not conducive to a teamwork environment."

On July 7, Lowe and De Los Santos, Respondent's human resources representative, met with Rodriguez. Lowe told Rodriguez that she had not passed her probation and that Respondent would not keep her as a full-time employee, as she was not a good fit for the job. When Rodriguez asked why, Lowe went through each item of Rodriguez' end-of-probation review. Lowe told Rodriguez she was not a team player, did not get along well with others, and made working at Chelmont difficult.

E. The September 29 Disciplinary Warning to Fanely

Fanely, employed since August 21, 2002, was an outspoken union supporter in 2004, and wore a union pin during the summer. Although Lowe denied knowing Fanely was a union supporter during 2004, she admitted that Fanely was the only CSR who wore a union pin, which she brought to Lowe's attention, saying, "Do you like my pin?" Fanely frequently complained to Lowe that she had to do much of Garcia's job without compensation. She also complained to Lowe, on behalf of Walker and Ornelas, that the two new CSRs had to do their follow-up work during their lunch and breaktime.

Garcia testified that beginning in March, after she was named office team leader, Fanely developed a negative attitude: she was not "a team leader;" she was defensive; she protested that certain tasks were not her "job;" she didn't say "good morning," and she slammed drawers.

On July 22, Respondent met with Fanely for her 6-month written review, at which Garcia was present. Despite Garcia's perception of Fanely's ongoing negativity, the review was glowing. In pertinent part, the review reads:

> [Fanely] has assisted her fellow team members showing them how to analyz[e] customer concerns and issues with a favorable outcome . . . [Fanely] is diligent about following rules and regulations. She tries to insure that the other employees are aware of any changes that have taken place or brings it to the supervisor's attention . . . [Fanely] is well aware of her job duties and continues to provide good customer service. She is helpful to her fellow co-workers and is willing to change her reporting hours as needed. . . .

Although the July 22 review contained no criticism of Fanely and cited no behavior or work issue needing improvement, according to Lowe, sometime in July Fanely's work attitude began to deteriorate. Lowe enumerated the following as evidence of unacceptable attitude:

1. Fanely became quiet and rude as evidenced by her turning her back on her supervisor while she was speaking or by not responding.

2. At Fanely's July 22 6-month review, Fanely questioned why Garcia was present.[8]

3. On one occasion in August Fanely stayed overtime although Garcia specifically refused permission. The following day, Fanely told Lowe of it, "throwing" papers at Lowe to demonstrate what she had worked on. When Lowe told Fanely her conduct was insubordinate, Fanely walked away.[9]

5. At an August 24 one-on-one meeting with supervisors regarding statistics keeping, Fanely was defensive, gave short answers, seemed angry, and would not make eye contact.

6. Complaints from other workers that Fanely was rude and abrupt, specifically, the following:

(a) In her exit interview of September 9, Bautista said Fanely would not respond when spoken to, told employees to slow down and not work so hard, and would not help with daily operations unless Lowe was present.[10]

(b) At about the same time, Munoz, at the Chelmont office on temporary assignment, reported to Lowe that Fanely, in the breakroom, had said, "I hate her. I hate Hilda. I f—ing hate her." Munoz said she did not want to work at Chelmont any more, as it was not a good work environment.[11]

(c) On September 21, Respondent held a code-of-conduct training session with CSRs, including Fanely. Kummrow and Lowe were also present. When the presenter, Alva Telles, stated that employee medical information was confidential and that a supervisor could not contact an employee's doctor, Fanely said that sometime in the past, a supervisor had contacted her doctor. Kummrow responded that the incident had happened years ago and had been corrected. Fanely said that she needed to know because she did not want it to happen again. Following the meeting, Grace Valdespino, Anthony office team leader, reported in an e-mail to Kummrow, later forwarded to Lowe, that while sitting beside Fanely in the

[8] Lowe testified that Fanely "really [made] a fuss" over Garcia being present. However, Lowe's contemporaneous memo notes that although Fanely "appeared angry," she merely said, "I thought this was just the supervisor and me."

[9] Lowe's contemporaneous memo of the incident notes that Fanely "shuffled" papers to show Lowe what she had worked on. Lowe testified that she told Fanely she had an attitude they needed to try and resolve, but the memo reflects no such statement. Although Fanely admitted she stayed late on August 10 without permission, she essentially testified that she intended to work without compensation and that she reported as much to Lowe, who thereafter increased follow-up time for everyone. Fanely denied that Lowe said she was insubordinate. Based on Lowe's manner and demeanor in testifying, her erroneous denial that she knew Fanely supported the Union, and the inconsistency between her memo and her oral testimony, I credit Fanely's account.

[10] Lowe was aware that Bautista had an uncongenial relationship with a number of CSRs. Lowe noted in a memorandum that Munoz complained of Vargas and Ornelas being "sarcastic" toward Bautista, of employees whispering behind her back, and of employees slowing their work. Munoz testified "there was tension [in the Chelmont office] because of [Bautista]," and "we all felt frustration towards [Bautista]." Munoz attributed the whispering and work slowdown to employees' anger toward their supervisors; she testified that the subject of Bautista being treated better than other employees was often discussed among the Chelmont employees. Munoz observed that Fanely "kept to herself more" and that "nobody was speaking to anybody, the work was just being left behind."

[11] Munoz said that while in the breakroom, she overheard Fanely speaking "maybe . . . to herself" regarding Bautista. When Munoz asked what had happened, Fanely declined to explain. The following week, Munoz told Lowe about the incident, as well as describing the tension she felt in the office and giving her opinion that the work wasn't being done.

meeting, she "felt an aura [of tension] around her. . . . Her comment gave me the impression that she is still holding a grudge or still angry about that supervisor calling her personal physician to verify an illness. . . . After the meeting . . . Elva . . . asked [Fanely] a question which was answered with a minimal response, which I felt was discourteous. . . . I left the meeting with an impression that [Fanely] is not moving forward with full commitment to the company."

On September 29, Lowe, in the presence of Sandra Alvarez, human resources representative, Manny Hernandez (Hernandez), labor relations representative, and Felipe Salazar (Salazar), union representative, issued a written disciplinary warning to Fanely, which reads in pertinent part:

> You have made statements and exhibited other behavior in the office that displays dislike or anger towards others. You also openly resist coaching and instruction from the office leadership. This behavior is offensive, creates an uncomfortable work environment, and is in violation of Company policy. As a result of your behavior, you are receiving a written warning which will be placed in your personnel file for a period of five years.
>
> In the future you are expected to refrain from abusive, threatening, insubordinate, or inappropriate behavior towards your fellow employees, customers, or management . . . .

Lowe accused Rodriguez of having used foul language on September 9, which offended another employee and of having been rude and angry toward Elva Telles in the September 21 meeting.[12] Lowe also told Fanely she was rude toward Garcia during "coaching," that she was disruptive, defensive, negative, and verbally abusive, and that a relief employee had reported feeling uncomfortable around her. Lowe said she had no problem with Fanely's work but only with her attitude. Salazar requested additional details such as witness names, which Hernandez declined to provide.

F. Alleged Unilateral Changes

At a CSR meeting on August 23, without prior notification to or bargaining with the Union, Lowe distributed a list of practices and procedures (the list) to CSRs and, inter alia, discussed the following:

1. Employees' lunch hours would change as of September 1 from three lunch "shifts" to five shifts with shift rotation on the first of each month.

2. CSR transactions would be monitored and "kept as part of [employee files] and review[ed] for immediate corrections as needed."[13]

3. Employees would be noted as late, even if only by one minute, and late time would be "deducted from [employee] time sheets and [would be] at no pay."

4. Employees would be permitted no more than three cashier shortages or overages per 6-month review period.[14]

A day or so after the meeting, Fanely gave Salazar a copy of the list. Salazar telephoned Marcelo Rios (Rios), an employee relations representative of Respondent and objected to Respondent's changes in CSR employment terms and conditions without negotiating with the Union. A few days later, Salazar met with Rios, who told him Respondent had no intention of changing the working rules and that it was just a misunderstanding. Salazar asked for something in writing stipulating that the rules set forth in the list were not going to be implemented. Rios refused. Thereafter, Respondent adhered to the new schedule of lunch hours.

V. DISCUSSION

A. Supervisory/Agency Status of Yvonne Garcia

Section 2(11) of the Act defines a "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.,* 332 NLRB 74 (2000), quoting *Union Square Theatre Management,* 326 NLRB 70, 71 (1998).

Of those powers enumerated in Section 2(11) of the Act, the only one possessed by Garcia related to her authority responsibly to direct the Chelmont office CSRs. Garcia made work assignments and could take a CSR off one job and assign her to another. She was in charge of the Chelmont office during the absences of Lowe, usually 2 days a week. There is not, however, sufficient evidence to determine whether Garcia exercised her limited authority with independent judgment and not in a merely routine or clerical manner. Such is the crucial question in deciding her supervisory status. As the United States Supreme Court noted, "The statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status. . . . It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies."[15] The Board is careful not to give too broad an interpretation to the statutory term "independent judgment" because supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.,* 328 NLRB 389 (1999); *McGraw-Hill Broadcasting Co.,* 329 NLRB 454, 459 (1999).

There is no evidence Garcia independently devised work plans or determined where or on what tasks CSRs were to work rather than following a system prescribed by Respondent. Accordingly, I cannot find the General Counsel met his burden of

[12] There is no evidence Elva Telles ever complained about Fanely's conduct.

[13] Vargas noticed no change in Respondent's review or overview of CSR work since the August 23 meeting, although she presumed Respondent was keeping track of it.

[14] According to Lowe, she "reminded" the employees of that rule. Fanely, Vargas, and Walker testified that prior to the meeting, they had known of no such rule. As of the hearing date, no discipline had been instituted as a result of shortage/overage errors.

[15] *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861, 1867–1868 (2001).

proving Garcia was a supervisor of Respondent within the meaning of the Act at any time relevant hereto.[16]

With regard to agency, Section 2(13) of the Act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board has noted, "When applied to labor relations . . . agency principles must be broadly construed in light of the legislative policies embedded in the Act."[17] The Board adopts the concept of apparent authority and applies the common law principles of agency when determining whether apparent authority is created, i.e., there must be some manifestation by the principal to create a reasonable basis for believing the principal has granted authority. *D & F Industries,* 339 NLRB 618, 619 (2003).

Garcia oversaw the work of the Chelmont CSRs, had the authority to enforce work rules, and brought employee work issues to the attention of Lowe. Two days a week, Garcia was in charge of the Chelmont office when Lowe was absent. She corrected employees when they made mistakes and pointed out infractions of work rules. During the union campaign, Respondent excluded Garcia along with Lowe and other "supervisory team leader-type" employees from its June 7 meeting, so as not to inhibit the CSRs. Respondent also utilized Garcia in its union campaign by having her distribute campaign literature and "Payday" candy bars that illustrated the bite union dues took from paychecks. On a daily basis, she conveyed information and decisions pertaining to production and work rules to the CSRs, moving the employees among workstations as needed. She administered Respondent's overtime and time off policies and enforced work rules. Importantly, Garcia relayed employee issues to Lowe. Thus Garcia served as a conduit between management and the CSRs. In these circumstances, Respondent placed Garcia in a position where employees could reasonably believe she acted for management. Ibid*; Mid-South Drywall Co.,* 339 NLRB 480 (2003). Accordingly, I find the General Counsel met his burden of proving Respondent vested Garcia with apparent authority to act as its agent within the meaning of the Act at relevant times. Therefore, knowledge possessed by Garcia concerning employees' protected activity is attributable to Respondent.

B. Alleged Independent 8(a)(1) Violations

The General Counsel alleges that in the course of the June 7 meeting, Hedrick threatened to discharge employees and threatened employees with unspecified reprisals if they engaged in union or concerted activities. There is no dispute that employees who asked questions, complained, or otherwise commented on Respondent's conditions of employment at that meeting were engaged in protected activity. The question is whether Hedrick's implicit suggestion that unhappy CSRs should seek other employment and his expressed expectation that Rodriguez, Fanely, and Vargas would vote for the Union violated Section 8(a)(1) of the Act as threats.

In determining whether a statement constitutes a threat in violation of Section 8(a)(1) of the Act, the Board does not consider subjective factors but rather whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *Reeves Bros. Inc.,* 320 NLRB 1082, 1084 (1996); *Sunnyside Home Care Project,* 308 NLRB 346 fn. 1 (1992).

It would be reasonable for employees to infer from Hedrick's remarks that employees who disagreed with Respondent's policies were "unhappy" and that unhappy employees were not likely to be comfortable in continued employment with Respondent. It is true that Hedrick did not state explicitly that Respondent would discharge or unfavorably regard and/or evaluate unhappy employees. However, by telling employees that those who were displeased with working conditions at Respondent should explore other employment opportunities, Hedrick equated employee unhappiness with tenuous job security. Further, by telling Rodriguez, Fanely, and Vargas he anticipated they would vote for the Union, Hedrick communicated his belief that they were "unhappy" employees, subject to the ramifications of that label. Accordingly, I conclude Hedrick implicitly threatened employees with reprisals if they continued to engage in protected activities. See *Paper Mart,* 319 NLRB 9 (1995); *Jack August Enterprises,* 232 NLRB 881 (1977).

C. The Unsatisfactory Performance Evaluation and Termination of Rodriguez

The question of whether Respondent violated the Act in issuing an unsatisfactory performance evaluation to and terminating Rodriguez rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove an employee was disciplined and/or discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.,* 331 NLRB 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact,* a motivating factor in the [employer's] decision." *Webco Industries,* 334 NLRB 608 fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Here, these elements are

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[16] As the party asserting Garcia's supervisory status, the General Counsel carries the burden of proving it. *Kentucky River Community Care, Inc.,* 121 S.Ct. 1861, 1866–1867 (2001); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003) ("The party asserting [supervisory] status must establish it by a preponderance of the evidence [citations omitted]").

[17] *Longshoremen ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 415 (1933), remanded 56 F.3d 205 (D.C. Cir. 1995).

clearly met: Rodriguez and Fanely openly signified union leanings by their comments to management in the June 7 meeting; Hedrick affirmed his awareness of their prounion views when he expressed an expectation that Rodriguez, Fanely, and Vargas would vote for the Union in the upcoming election, and Hedrick demonstrated animus toward employees' union sympathies and protected activities when he suggested that unhappy CSRs should seek other employment. Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Rodriguez' protected activities were motivating factors in Respondent's decisions to unfavorably evaluate and to discharge her. *Tom Rice Buick, Pontiac & GMC Truck,* 334 NLRB 785, 786 fn. 6 (2001). However, a finding that the General Counsel has met his initial burden does not mean that Rodriguez' evaluation or discharge was in fact "*unlawfully motivated*." Id. As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus . . . may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.,* 340 NLRB 1093, 1094 fn. 4 (2003); see also *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). The General Counsel's establishment of those factors does, however, shift the burden to Respondent to demonstrate that it would have unfavorably evaluated and discharged Rodriguez even in the absence of her protected activities.

Respondent contends that as Lowe made the decision unfavorably to evaluate and to terminate Rodriguez, the General Counsel must show Lowe knew of Rodriguez' union activity. Respondent's argument is flawed. Hedrick knew or suspected that Rodriguez favored the Union, which knowledge, in the present circumstances, must be imputed to Respondent generally, *Springfield Air Center,* 311 NLRB 1151 (1993); *Dobbs International Services,* 335 NLRB 972 (2001). Moreover, while there may be no direct evidence that Lowe knew Rodriguez supported the Union,

> [i]t is well established that, in the absence of direct evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. Such circumstances may include the employer's demonstrated knowledge of general union activities, the employer's demonstrated union animus, the timing of the discipline or discharge, and pretextual reasons for the discipline or discharge asserted by the employer [citations omitted]. *D & F Industries,* at 622.

Both Lowe and Garcia knew what had occurred in the June 7 meeting.[18] Both were also aware that Rodriguez criticized Respondent to other employees and said she did not like working for the company. It is reasonable to infer that Lowe must have known or at least strongly suspected that an employee as outspokenly critical of Respondent as Rodriguez, was likely to support the Union in its contemporaneous representation campaign. Moreover, Lowe based the unfavorable evaluation and consequent discharge on the following pretextual reasons, which, of themselves, evidence knowledge of and animus toward Rodriguez' protected activities:

1. *Rodriguez' failure to complete the 4- to 6-weeks training at the Fabens office*. Lowe agreed to place Rodriguez at the end of the new CSR training queue but when her turn came, decided instead to train her on the job at Chelmont. For Respondent to identify incomplete training for which Respondent was responsible as a basis for poor evaluation/discharge is blatant pretextuality.

2. *Rodriguez' time and attendance problems*. Although Rodriguez used more time-off hours than Walker or Ornelas, she missed far less time than Bautista did. While Lowe asserted that probationary employees' attendance was more closely monitored than regular employees, there is no evidence any probationary CSR was so informed, and Lowe never told Rodriguez her time and attendance was a problem. Therefore, I conclude this asserted reason was also pretextual.

3. *Rodriguez' poor job performance*. Respondent's evidence that Rodriguez was responsible for more customer service errors than the other probationary employees is questionable. Moreover, prior to Rodriguez' discharge, Lowe never informed her that her error rate was unacceptable or attempted to reinstitute the missed training. In fact, at her 3-month progress review, Lowe told Rodriguez she was doing "pretty good" and praised her customer communication skills. To delay criticism of employee performance until the hour of discharge, as Respondent did here, creates a strong inference of pretextuality.

4. *Rodriguez' "attitude in the workplace was not conducive to a teamwork environment*." In March, Low praised Rodriguez' interaction with customers and identified no attitude problem. Four months later, without any intervening comment or counseling, Lowe implicitly recanted her positive March assessment and asserted in Rodriguez' 6-month rating sheet that her "conduct at work *the last six months* ha[d] not been conducive to positive, professional working relationships and a team environment [emphasis added]." Lowe did not explain why her opinion of Rodriguez changed so drastically between March and July, and her description of Rodriguez' poor attitude was vague, relying on such nonspecific terms as "negative body language," moody, angry, and condescending. In contrast, Respondent's witness, Munoz, described Rodriguez as "peppy, outgoing, very hard working" and commended her for picking up the slack at the Chelmont office. Given the contradictory accounts of Rodriguez' attitude as well as Lowe's nebulous and tergiversating depiction, I can only conclude that this proffered reason for discharge was, like the others, pretextual.

Respondent points out that Vargas, who engaged in conduct at the June 7 meeting "virtually identical" to that of Rodriguez and Fanely and was a well-known union supporter, was promoted following the meeting. This promotion, Respondent argues, militates against a finding that union animus could have motivated its termination of Rodriguez. While Vargas did speak up, Rodriguez and Fanely were clearly the meeting's cynosures. Of the comments made at the meeting, Sylvia Por-

[18] In contending that there is no evidence Lowe heard about Rodriguez' participation in the June 7 meeting, Respondent has ignored Vargas' testimony, which I credit, that Lowe admitted to her that she knew what had occurred in the meeting.

ter, Respondent's assistant general counsel, could only recall specifically those made by Rodriguez and Fanely; Hedrick described Rodriguez as being clearly upset, and he admittedly was frustrated that she "dominat[ed] the meeting" with a discourse he could not stem and which he perceived to be aimlessly repetitious. Thus Vargas' participation in the meeting cannot be said to parallel that of either Rodriguez or Fanely. Moreover, it is well established that evidence of unlawful discrimination is not disproved simply because not all union supporters are adversely affected. *Volair Contractors,* 341 NLRB 673 fn. 17 (2004).

Respondent correctly asserts that the Act cannot insulate an employee from the consequences of disruptive conduct, and I also recognize the fact that an employer may desire to retaliate against employees or to curtail union activities does not, of itself, establish the illegality of a discharge. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries,* supra; *Klate Holt Co.,* 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems,* 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. Ibid.

Respondent argues that it has satisfied its affirmative defense burden by demonstrating that Rodriguez would have been terminated notwithstanding her protected activity. In meeting its burden, Respondent must show that Rodriguez' termination would have (not just could have) occurred regardless of her dissatisfaction with Respondent and her support of the Union. *Yellow Enterprise Systems,* 342 NLRB 804, 804 (2004); *Avondale Industries,* 329 NLRB 1064 (1999); *T & J Trucking Co.,* 316 NLRB 771 (1995). Inasmuch as I have concluded that the asserted reasons for Rodriguez' termination are pretextual, it follows that they cannot form a legitimate basis for Rodriguez' discharge. Moreover, the specific behavior Respondent cites as demonstrating Rodriguez' bad "attitude," for which she was fired, is protected: complaining about how the Chelmont office was run, making negative comments about Respondent, and objecting to Lowe about disparate leave treatment, an issue that engendered protest from many employees. Rodriguez' attitude, as perceived by Garcia and Lowe, is so integrally connected with Rodriguez' protected complaints about working conditions, that her discharge on that basis is unlawful under the Act regardless of Respondent's motivation, unless Respondent can show that Rodriguez engaged in misconduct. While Respondent may genuinely have believed that Rodriguez' discontent and complaining constituted misconduct, that is not sufficient to justify her discharge under. In *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good faith, albeit mistaken, belief the employee engaged in misconduct in the course of protected activity. Id. at 23–24. The evidence herein does not establish that Rodriguez engaged in misconduct. There is no evidence her attitude was disruptive to employee relations, caused dissension, adversely affected any employee's work performance, disturbed or hindered the work, or was beyond the bounds of what is protected by the Act.[19] Indeed, no supervisor even mentioned her attitude to her prior to her discharge.

Accordingly, Respondent not having met its burden of demonstrating that it would have given Rodriguez an unfavorable evaluation and discharged her even in the absence of her protected conduct, I find Respondent violated Section 8(a)(3) and (1) of the Act by doing so.

D. The Disciplinary Warning to Fanely

The *Wright Line* analysis utilized in resolving the issues related to Rodriguez applies to the discipline Respondent imposed on Fanely. The General Counsel must prove the elements of discriminatory motivation regarding Fanely's disciplinary warning: union activity, employer knowledge, and employer animus. The General Counsel has satisfied its burden. Fanely along with Rodriguez revealed her union sympathies in the June 7 meeting, and Hedrick evidenced both knowledge and animus, as set forth above. In addition to her role in the June 7 meeting, Fanely was a prominent union adherent: she was the only CSR to wear a union button, which she brought to Lowe's attention. Fanely also engaged in other protected activities, such as remonstrating with Lowe against Respondent permitting two new CSRs to work on their own time.

Respondent argues that Fanely has been a known union supporter for years without retaliation from Respondent, which vitiates the General Counsel's contention that union animus prompted the disciplinary warning. Respondent's argument is unpersuasive; an employer may alter its union stance at any time, and the Board has noted that an employer's past indifference to union activity does not preclude a discrimination finding. *Yellow Enterprise Systems,* supra at 806. Accordingly, I find the General Counsel has made "a showing sufficient to support the inference" that Fanely's protected activities were motivating factors in Respondent's decision to issue her a disciplinary warning. The burden of persuasion thus shifts "to [Respondent] to demonstrate that the same action would have taken place even in the absence of [Fanely's] protected conduct." *Wright Line*, supra at 1089.

Respondent argues that, even assuming the General Counsel met its *Wright Line* burden, Respondent would have disciplined Fanely regardless of any union animus because of her unacceptable "attitude," as described by Lowe's following summary:

> (1) Quietness and rudeness to her supervisor.
> (2) Questioning why the office team leader was present during her July review.
> (3) Insubordination in staying overtime in August.

[19] Respondent describes Rodriguez' e-mail to Lowe in which she protested leave disparity as "insubordinate." Not only is there nothing in the e-mail that suggests insubordination, Lowe's response shows no displeasure, and there is no evidence she ever expressed any dissatisfaction with either the e-mail or Rodriguez' request for time off. Accordingly, I find Rodriguez' e-mail was not insubordinate.

(4) Defensive, angry manner in an August meeting with supervisors.

(5) Coworker complaints.

In determining whether Respondent met its burden, I do not consider whether Respondent's discipline of Fanely was either wise or well supported but only whether Respondent has shown it would have disciplined Fanely notwithstanding her union or other protected activity. See *West Limited Corp.,* 330 NLRB 527 fn. 5 (2000).

Respondent does not dispute that Fanely was an excellent worker; it takes issue only with her attitude, which Respondent asserts underwent a dramatic change in 2004. There is inconsistency in Respondent's evidence as to when Fanely's attitude changed from excellent to unacceptable: Garcia dates the deterioration in March; Lowe claimed it started sometime in July. Documentary evidence doesn't support either timing. As of July 22, the date of Fanely's 6-month review, Respondent was fully satisfied with Fanely's work, and Fanely's written review reflected no attitude problems. In the review, Lowe praised Fanely as "helpful to her fellow co-workers" and "diligent about following rules and regulations," the apparent antithesis of an attitude problem. Garcia was present during the review, and there is no evidence she objected to or even presented any differing view as to Lowe's assessment of Fanely. Consequently, I discount Garcia's testimony that Fanely exhibited attitude problems beginning in March. I also discount Lowe's testimony that the problems began in July. For Lowe's timing to be accurate, Fanely would have had to make an attitudinal volte-face in the 9 days of July remaining after Lowe gave her a glowing review. The likelihood of that happening is so inherently incongruous, that I cannot accept it without persuasive supporting evidence, which Respondent has not provided.[20] With regard to Respondent's contention that Fanely was rude to her supervisors, Respondent has not supported the accusation with reliable details. As set forth above, I have discounted Garcia's testimony to that effect, and the vagueness of Respondent's rudeness accusations and the lack of specific supporting evidence thereof constitute additional evidence of pretext. I do not accept, therefore, that Respondent was dissatisfied with Fanely's attitude in or before July, and I find Respondent's unreliable assertion of it is evidence of pretext.

On August 20, Respondent's CSRs selected the Union as their bargaining representative in a Board-conducted election. Thereafter, according to Respondent, Fanely exhibited defensiveness and angry brusqueness at an August 24 meeting with supervisors. I cannot give credence to Respondent's proffered evidence of that. No supervisor pointed out to Fanely that her manner or conduct in the August 24 meeting was objectionable until Lowe issued the September 29 warning. As for the e-mail from Lucy Estrada to Lowe commenting on Fanely's "negative" responses at the August 24 meeting, several factors persuade me to place scant confidence in it: Respondent has not explained why Estrada waited for over 3 weeks to express her disapproval of Fanely's behavior, and the e-mail itself reads like a belated documentation of the incident. Both the tone of the e-mail and its timing create a reasonable inference that Respondent was attempting to strengthen a weak and pretextual complaint against Fanely. Respondent's accusation that Fanely was insubordinate when she worked overtime in August is similarly untrustworthy. Respondent clearly did not think the incident merited discipline when it occurred, and, in fact, Lowe condoned Fanely's action. For Respondent now to cite Fanely's conduct in that instance as insubordination is additional evidence of pretext. It remains to consider Respondent's claims that coworker complaints about Fanely justified the discipline.

Respondent cites three employee reports it relied on in disciplining Fanely: Bautista and Munoz' September 9 reports and Valdespino's report of discourtesy to a guest presenter on September 21. As to Bautista's complaint, Respondent conducted no investigation of her assertions, even though Respondent had to have known circumstances existed that might account for Bautista's criticism of Fanely or at least impact her credibility. Lowe must have known there was bad blood between Bautista and nearly every other CSR; Munoz told her the CSRs were sarcastic toward Bautista and whispered behind her back. Munoz also told Lowe that "nobody was speaking to anybody, the work was just being left behind." There was nothing in Munoz' report to link low morale or work slowdown to Fanely; her comments were, rather, an indictment of the entire office. It is reasonable, therefore, to expect that if Respondent were sincerely interested in arriving at the truth and improving morale, it would not have accepted Bautista's condemnation of Fanely so readily. Respondent's failure to conduct any further inquiry suggests Respondent had a less innocent objective. As for Munoz' report that Fanely had angrily expressed her dislike toward Bautista in the breakroom, very little inquiry would surely have elicited the ameliorating information that Fanely made the comments to herself, did not attempt to involve or abuse any other employee, and declined to gossip about Bautista. Respondent's failure to conduct any investigation into that incident and its failure to give Fanely an opportunity to explain her alleged conduct before imposing discipline significantly support a finding that Respondent's motivation in issuing a warning to her was discriminatory. See *Midnight Rose Hotel & Casino, Inc.,* 343 NLRB 1003, 1005 (2004).

Finally, Valdespino's criticism of Fanely's September 21 conduct is so vague and trivial that Respondent's reliance upon it is nearly inexplicable. Valdespino accused Fanely of radiating an "aura" of tension, of giving the impression of unwillingness to "[move] forward with full commitment to the company," and of giving the code-of-conduct trainer a minimal response, which Valdespino—not the trainer—thought discourteous. The only accusation of any substance is that relating to rudeness to the trainer. However, there is no evidence Respondent made any attempt to find out from the trainer if Fanely's manner had offended her, and Valdespino's description of the rudeness doesn't permit a reasonable inference that Fanely had

[20] Fanely's alleged behavior at the review does not provide supporting evidence. Not only have I declined to accept Lowe's account of Fanely's behavior, Fanely's apparent displeasure at the presence of Garcia could not have come as a surprise to Lowe since Fanely frequently complained of having to do much of Garcia's job, which, given the favorable review, apparently had not diminished Lowe's good opinion of Fanely.

been, as Respondent asserted in the disciplinary meeting, rude and angry toward the trainer.

Inasmuch as Respondent's evidence of Fanely's alleged transgressions suffers from the above-described deficiencies, I cannot give it significant weight. Accordingly, I find that Respondent has failed to show it would have taken action against Fanely in the absence of her protected activities and that Respondent violated Section 8(a)(3) of the Act by issuing a written disciplinary warning to Fanely on September 29.

D. The Alleged Unilateral Changes

Respondent at no time discussed any term or condition of unit employees' employment with the Union. Therefore, if Respondent's modifications of the following employment matters are material, substantial, and significant changes to unit wages, hours, and other terms and conditions of employment, they constitute unilateral changes in violation of Section 8(a)(5) of the Act:[21]

1. Change in employee lunch hour schedules.
2. Monitoring of CSR transactions for review and correction.
3. Notation of employee tardiness.
4. Restriction of employees to no more than three cashier shortages or overages per six-month review period.

Respondent argues that the General Counsel has not met its burden of proving that the changes alleged in the complaint are actually alterations of Respondent's former and established practices. I agree with Respondent that the General Counsel has not shown that items 2 and 3, the monitoring of CSR transactions and notation of employee tardiness, are significant changes. The evidence shows that Respondent conducted some method of monitoring transactions, i.e., a number of witnesses related supervisor notification of mistakes they had made, and Respondent's attendance records show notation of employee absences in small increments. While it may be that some alteration of past procedure occurred with regard to mistake monitoring and tardiness recordation, where the change is merely a tightening of existing standards or discipline, preimplementation bargaining is not required. See *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991), where the Board cited with approval the finding of *Trading Port,* 224 NLRB 980 (1976), that where the standards [of productivity/efficiency] and sanctions remained the same, the related "tightening of the application of existing disciplinary sanctions did not require bargaining with the union."

However, the evidence reveals that Respondent's change in CSR lunch hour schedules was a significant departure from past practice and impacted unit conditions of employment. See *Meat Cutters Local Union 189 v. Jewell Tea Co.,* 381 U.S. 676, 691 (1965), *Eugene Iovine, Inc.,* 328 NLRB 294 (1999). Likewise, Respondent's institution of a cashier shortage and overage limitation was a departure from past practice and presumably provided new grounds for discipline, thus impacting job security. *Bath Iron Works Corp.,* supra; see also *Brimar Corp.,* 334 NLRB 1035 (2001). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed CSR lunch hour schedules and altered cashier shortage and overage limitations.

[21] *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. Dothan Eagle*, 434 F.2d 93 (5th Cir. 1970); *Beverly Health & Rehabilitation Service*, 335 NLRB 635 (2001).

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
2. Respondent violated Section 8(a)(3) and (1) of the Act on July 7 by issuing an unsatisfactory performance evaluation to and by discharging Rodriguez.
3. Respondent violated Section 8(a)(3) and (1) of the Act on September 29 by issuing a written disciplinary warning to Fanely.
4. The following unit of Respondent's employees is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center [employees] at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

5. The Union has been at all times since August 20, and is, the exclusive bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
6. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by unilaterally changing terms and conditions of employment for employees in the above unit commencing August 23.
7. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.
8. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Cecilia Rodriguez, it must offer her reinstatement insofar as it has not already done so and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent having unlawfully refused to bargain with the Union about certain terms and conditions of employment of represented employees, Respondent must rescind its unilaterally altered CSR lunch hour schedules and cashier shortage and

overage limitations instituted on August 23. Respondent shall also make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful changes, computed as prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, El Paso Electric Company, El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.

(b) Issuing unsatisfactory performance evaluations to or discharging any employee for engaging in union or other protected activities.

(c) Issuing written disciplinary warnings to or otherwise disciplining any employee for engaging in union or other protected activities.

(d) Unilaterally changing terms and conditions of employment for employees in the following unit (the unit):

> All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center [employees] at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its unilaterally altered CSR lunch hour schedules and cashier shortage and overage limitations instituted on August 23, and notify the Union and the unit employees in writing that it has done so.

(b) Make whole employees in the unit, with interest, for any loss of earnings and other benefits that they may have suffered due to the Respondent's altered CSR lunch hour schedules and cashier shortage and overage limitations instituted on August 23.

(c) Within 14 days from the date of this Order, insofar as it has not already done so, offer Cecilia Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Cecilia Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(e) Expunge from its files any reference to the discriminatory unsatisfactory performance evaluation issued to, and the discharge of, Cecilia Rodriguez and thereafter notify her in writing that this has been done and that neither the evaluation nor the discharge will be used against her in any way.

(f) Expunge from its files any reference to the discriminatory written warning issued to Sira Fanely, and thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its El Paso telephone center and its outlying offices in Texas and New Mexico, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 7, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, CA April 4, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT unilaterally change terms and conditions of employment of employees in the following unit, including CSR lunch hour schedules and cashier shortage and overage limitations:

> All full-time and regular part-time customer service representatives I, II, III and customer service-clerk-telephone center [employees] at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens, and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

WE WILL NOT discharge any of you for supporting International Brotherhood of Electrical Workers, Local Union 960, AFL–CIO (the Union) or for engaging in other protected activities.

WE WILL NOT issue unsatisfactory performance evaluations to any of you for supporting the Union or for engaging in other protected activities.

WE WILL NOT issue written disciplinary warnings to any of you for supporting the Union or for engaging in other protected activities.

WE WILL NOT tell employees they are unhappy or suggest they seek other employment or otherwise impliedly threaten them with reprisals if they engage in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL rescind the CSR lunch hour schedules and cashier shortage and overage limitations we unilaterally changed on August 23; WE WILL reimburse any employee for any loss they suffered due to these changes, and WE WILL notify the Union in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer Cecilia Rodriguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make Cecilia Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL within 14 days from the date of the Board's Order, expunge from our files any reference to the discriminatory unsatisfactory performance evaluation issued to, and the discharge of, Cecilia Rodriguez and thereafter notify her in writing that this has been done and that the evaluation and discharge will not be used against her in any way.

WE WILL within 14 days from the date of the Board's Order, expunge from our files any reference to the discriminatory written disciplinary warning issued to Sira Fanely, and thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

EL PASO ELECTRIC COMPANY